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No. 94-312

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1994

FOSTER WHEELER ENERGY CORPORATION,
Petitioner,

v.

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER FOSTER WHEELER ENERGY CORPORATION

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14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

1. Respondent has failed to rebut Petitioner's argument that the circuit court committed an egregious error of law in enforcing an 8(f) agreement that the NLRB had determined in 1985 with total agency finality could not be enforced under pre-*Deklewa* law, same case, same parties, same issue, and which also was unenforceable under the substantive law of *McNeff*..... 1

2. The retroactive application of a drastic change in settled substantive law made by an administrative adjudication..... 7

3. The arbitrator's decision..... 9

CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases: Page

Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806 (5th Cir. 1981)..... 5

C.I.M. Mechanical Co., 275 NLRB 685 (1985)..... 2

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)..... 8

Deluxe Metal Furniture Co., 121 NLRB 995 (1958)..... 4

Fox Painting Co. v. NLRB, 919 F.2d 53 (6th Cir. 1990)..... 3,4

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993)..... 7,8

International Bhd. of Elec. Workers, Local 613 v. Fowler Indus., Inc., 885 F.2d 551 (11th Cir. 1989)..... 5

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)..... 7,8

Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983).... 1,4,5,7

Cases -- Continued: Page

John Deklewa & Sons, Inc., 282 NLRB 1375 (1987), enforced sub nom. *International Ass'n of Bridge Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988)..... passim

Local Union 72 v. John Payne Co., 850 F.2d 1535 (11th Cir. 1988)..... 7

NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Iron Workers, 434 U.S. 335 (1978)..... 2,4

Painters Local Union No. 164 v. Epley, 764 F.2d 1509 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986)..... 1,2

R.J. Smith Constr. Co., 191 NLRB 693 (1971).....1,2,3

SEC v. Chenery Corp., 332 U.S. 194 (1947)..... 8

South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976)..... 5

Statute:

Labor Management Relations Act, 1947, as amended, § 301, 29 U.S.C. § 185..... 8

INTRODUCTION

The key issue in this case can be simply stated. Had the NLRB not reversed 17 years of precedent in *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987) ("*Deklewa*"), enforced sub nom. *International Ass'n of Bridge Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), could Petitioner, under the attendant facts and following *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983) ("*McNeff*") and other clear precedent, have repudiated the prehire agreement at the Bayou Jonas project in 1985, and if so, when and how did it do it. Because Petitioner took the steps to effectively repudiate this agreement in 1985, expressly articulating reliance on substantive pre-*Deklewa* law, Respondent's arguments concerning fraud, deceit, subterfuge and the many facets of retroactivity discussed by the circuit court are just shadow-boxing with non-issues to nullify a repudiation totally lawful when made.

1. **Respondent has failed to rebut Petitioner's argument that the circuit court committed an egregious error of law in enforcing an 8(f) agreement that the NLRB had determined in 1985 with total agency finality could not be enforced under pre-*Deklewa* law, same case, same parties, same issue, and which also was unenforceable under the substantive law of *McNeff*.**

a. In 1985 there was no legal impediment to voiding this agreement under the Court's *McNeff* interpretation of section 8(f), the Eleventh Circuit's interpretation in *Painters Local Union No. 164 v. Epley*, 764 F.2d 1509 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986), and the legion of NLRB decisions from *R.J. Smith Constr. Co.*, 191 NLRB 693

(1971), to *Deklewa*.[1] Petitioner and EPC, each relying upon the advice of experienced labor counsel, did exactly what the Court and the Board in many decisions said could be done when it exercised its statutory right to repudiate. Petitioner went so far as to specifically articulate reliance upon *Epley*, in its August 9 letter of repudiation. App. 264a.

b. Respondent union had the same self-enforcement right to repudiate the agreement anywhere, including Bayou Jonas, even if Petitioner had used Local 70's referral system. Respondent could not have that power without Petitioner having it too. As the NLRB said in *Deklewa*, 282 NLRB 1375, 1378: "[t]he agreement itself also has no immunity. It can be repudiated by either party, at any time, for any reason, and it cannot be enforced through Section 8(a)(5) or Section 8(b)(3)." This includes a good reason, a bad reason, or no reason at all.

c. Respondent quotes the court below "that some recurring circumstances have been identified as rendering retrospective application of the *Deklewa* rule manifestly unjust does not dictate a similar result in other cases presenting a dissimilar coincidence of circumstances." Opp. 11. The Third

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[1] In *C.I.M. Mechanical Co.*, 275 NLRB 685 (1985), decided June 14, 1985, the NLRB cited *R.J. Smith Constr. Co.*, 191 NLRB 693 (1971) and *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Iron Workers*, 434 U.S. 335 (1978), and affirmed the ALJ's decision that the "Unions must prove actual majority status in order to show a violation of Section 8(a)(5) of the Act. It cannot be presumed that the Unions were the employees' representatives. . . . Absent a permanent and stable work force the Unions could obtain 9(a) status by showing their majority status at a particular jobsite". *C.I.M. Mechanical*, 275 NLRB at 691.

Circuit's statement misses the mark, because no two cases are exactly alike. The four board decisions approving *Deklewa* retroactivity had but one key recurring dispositive circumstance, the union had established majority status and thus had achieved recognition and representational rights. These were cases in which the regional directors had issued complaints under pre-*Deklewa* law. The agency's final disposition under *Deklewa* yielded the same result it would have reached under *R.J. Smith*. However, in ***every*** case in which *Deklewa* was not applied retroactively, the "coincidence of circumstances" was that the union had not established its majority representation based on employee free choice. In ***every*** such case, except the case at bar, the courts have refused to apply *Deklewa* retroactively. The decision of the court below, without question, has created a conflict in the circuits.

d. This case had been definitively resolved two years prior to *Deklewa,*[2] could not be re-opened by the Board and so was not "pending" when *Deklewa* was decided. In *Fox Painting Co. v. NLRB*, 919 F.2d 53 (6th Cir. 1990), the Sixth Circuit refused to apply *Deklewa* retroactively because there had been a final disposition before *Deklewa*. The court

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[2] The NLRB General Counsel is required to follow settled NLRB law. Applying the same well settled law contemporaneously being applied by the five-person Board and the same well established law Petitioner relied upon to oppose Respondent's enforcement of the prehire agreement, the General Counsel affirmed three regional directors' dismissal of separate ULP charges; the prehire agreement was not enforceable because Respondent did not have majority support in an appropriate unit at the disputed project site. One Regional director concluded that the agreement had been repudiated. App. 77a.

explained that the phrase "all pending cases in whatever stage" originated in *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), where the Board explained that applying a new rule retroactively affects "any other case which has not yet been decided, ***because it has not reached the Board's level or is at one of the other stages of the administrative process such as the hearing."*** *Fox Painting*, 919 F.2d at 56 (quoting *Deluxe Metal*, at 1006). The court held that *Deklewa* did not apply in that case because there had been a final determination before *Deklewa* was decided.

As in *Fox Painting*, all the operative facts relevant to this case came to an end before the section 301 suit was filed and not later than August 9, 1985, the repudiation date found by the district court and conceded by Respondent if *Deklewa* did not apply retroactively.[3] Repudiation in this case was a ***fait accompli*** in fact and law. Consequently, the circuit court in effect resurrected a case that had died within the NLRB in 1985, and which the Board in 1987 did not intend to disinter by its announcement of new prehire rules.

e. The fallacy in the decision below is due in large part to a misreading of *McNeff*, which holds that the enforceability of an 8(f) prehire agreement as a collective bargaining agreement is a representation matter dependent upon the

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[3] Respondent now says, Opp. 15, that the issue is not *Deklewa* retroactivity, but *Iron Workers* retroactivity because this is a section 301 case, not a case on direct agency review. *Iron Workers*, however, was not a section 301 case. Moreover, Respondent's argument, Opp. 15, that because this is a section 301 suit and *Deklewa* retroactivity should play no part in it is precisely the argument Petitioner has made all along; the rules applicable to this case in 1985 are the rules in *McNeff*.

union having established majority representation among employees in an appropriate unit at the disputed project. See also *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976). An employer who had used a local union's referral system and hired employees pursuant to the economic terms under which the referral system operated had "heard the music" and must pay the pipers (employees whom it had employed under the referral system) "accrued money damages," in a section 301 suit. See *International Bhd. of Elec. Workers, Local 613 v. Fowler Indus., Inc.*, 884 F.2d 551, 555-56 (11th Cir. 1989).

f. No employer at the Bayou Jonas project used the Local 70 referral system or the economic terms of any claimed applicable agreement to secure employees. No employer heard any *McNeff* music because there was no piper. The failure of a double-breasted operation during the term of a prehire agreement because of company interdependence could not in 1985 cause a § 8(f) prehire agreement to mature into a full blown enforceable § 9(a) collective bargaining agreement,[4] absent established union majority representation.

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[4] The Third Circuit recognizing this to be the case stated that it had serious doubts whether equity factors had anything to do with a party's legal right to repudiate an 8(f) prehire agreement, App. 42(a); that is, making a minority union the legally recognized representative for purposes of enforcing a collective bargaining agreement. Respondent's resort to a section 301 suit was a forum shopping continuation of the dismissal of the three ULP charges. See *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 657 F.2d 806, 812-13 (5th Cir. 1981) ("If the goal is the maintenance and insurance of *employee* free choice, it matters not whether the sword dangling above the employer's head is an unfair labor practice charge or a breach of contract suit. The direction of the pressure is the same -- toward treatment of a nonmajority union as the employee's agent for collective bargaining.").

Respondent's vituperative attack on the integrity of Foster Wheeler Corporation is both unjustified by the record and irrelevant to the rationale of 8(f) labor policy in 1985, stability of labor relations and employees' free choice. Respondent attacks defendants as blackguards whenever its legal argument is weak. It fails to add at this point of its attack that the district court concluded after an evidentiary hearing that Respondent with Local 70 in trusteeship, had attempted to force on the court a § 301 suit for significant damages for not utilizing Local 70's referral system which openly operated in violation of both federal and Alabama statutes.[5]

g. Respondent does not seek "accrued money damages" for employees who worked at the project site on the ground that the prehire agreement was not applied to those employees, but rather it was fully enforceable retroactive to 1985 (including arbitration) even though the Union makes no pretense to, and actually disclaimed, majority representation of employees at the project site. Respondent also misstates Petitioner's major argument why this prehire agreement was not enforceable. No matter how "broadly stated" an arbitration clause may have been, absent established representation based on majority status, such agreement

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[5] Article V, Section 1, states: "The Employer agrees to comply with local area referral and hiring procedures contained in the local Laborers' agreement, provided such procedures meet state and federal laws and are not inconsistent with the terms of this Agreement." App. 304a. The question of the illegality of the referral system, assuming *arguendo* agreement enforceability, is not one of arbitrability, but of mootness.

never matured into an agreement enforceable by arbitration or otherwise.[6]

The circuit court has applied retroactively a decision of an agency which purports to redefine and reinvent what the Supreme Court meant in *McNeff* when to this time the Court has done no such thing. If this case is not the one to set the court below right on *McNeff*, what better case can there be? The only true issue that was not reached by the circuit court was how much earlier than June 6 or August 9 did repudiation occur. *Local Union 72 v. John Payne Co.*, 850 F.2d 1535 (11th Cir. 1988), closely parallels the facts of this case and is apropos.

2. The retroactive application of a drastic change in settled substantive law made by an administrative adjudication.

a. Respondent asserts that Certiorari should not be granted to determine the proper standard applicable to decide the retroactive application of new law announced in an administrative adjudication because the courts of appeal are not split over the application of *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) and *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993) to administrative decisions. Opp. 14. Respondent misstates the issue presented in the Petition.

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[6] Respondent seeks to enforce this prehire agreement without establishing majority support of employees actually employed because it does not seek money damages accrued to employees who actually worked at the Bayou Jonas project. Its complaint was brought on behalf of itself, Local 70, and its members.

The split among the circuits does not concern the application of *Beam* and *Harper*. That was an argument which Respondent lost in both the district court and the court directly below. Rather, the fragmentation in the Federal courts concerns whether the proper test is set forth in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) and its progeny, or *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Respondent's claim that the Third Circuit "believed that there was no substantive difference" between the *Chevron* and *Chenery* tests, Opp. 15, is false. The circuit court pinpointed the critical - and, under its analysis, dispositive[7] - difference between the two tests:

> The key discrepancy between the two inquiries is that, whereas *Chevron Oil* focuses on the *reasonable expectations* of the *class of persons* who will be adversely affected by retrospective application of the newly announced rule of law, *Chenery* concentrates on the *actual* reliance on the prior rule by the *particular* adversely affected *party* before the court.

App. 35a. Even those courts that purport to follow *Chenery* are divided on its application. Pet. 13-14.

b. Respondent's argument that this case is inappropriate to address the retroactivity of agency decisions because it arose under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, rather than on direct agency review,

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[7] The Third Circuit recognized that "it may be that the district court was correct when it decided that a *Chevron Oil* analysis would not countenance retrospective application of *Deklewa* to this case." App. 34a, n.10.

Opp. 15, is illusory. A court reviews agency action for an abuse of discretion. It is only in a section 301 or similar context that a court must independently determine whether retroactive application of a new law announced in a separate administrative adjudication is appropriate in the case before it. Regardless of whether the *Deklewa* retroactivity question itself will recur - Respondent's lead argument against Certiorari, Opp. 10-13, ***there can be no doubt*** that the retroactive application of agency adjudicative decisions in general and NLRB decisions in particular is a persistent and pervasive issue today, and will continue to be so in the future.

3. The arbitrator's decision.

The district court limited the arbitrator's authority solely to determine whether FWC, FWEC and EPC were alter egos; that is, whether the agreement applied at Bayou Jonas. With respect to anything else that the arbitrator purported to decide, the district court set it aside as not covered in his order to arbitrate. With respect to the issue the district court referred to arbitration, the circuit court set it aside, vacating the entire order to arbitrate.[8] Petitioner has not consented to arbitrate what the district court refused to order be arbitrated. The district court's refusal, reserving to itself the determination of liability and the date of repudiation to be made under existing 1985 law, was a key adjudication upon which Petitioner could and did rely because that was also the

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[8] The circuit court stated: "On consideration whereof, it is now here ordered and adjudged by this Court that: 1) the order of the said District Court, entered December 11, 1985, compelling arbitration, be, and the same is hereby vacated and the cause remanded . . ." App. 224a.

settled substantive law at the time. Petitioner's position has never waivered that in 1985 a union could not enforce any part of a prehire agreement absent a showing that a majority of the employees actually employed in an appropriate unit wanted the union to represent them. It defies all logic for the circuit court to conclude that an arbitrator had authority pursuant to a court order to make findings beyond the limited question the district court ordered the arbitrator to decide.

CONCLUSION

For all the aforementioned reasons and those set forth in Petitioner's opening brief, Petitioner respectfully requests that a Writ of Certiorari should issue.

Respectfully submitted,

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